

BEFORE THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2021-143-E & 2021-144-E

In the Matters of:	)	SOUTH CAROLINA COASTAL
	)	CONSERVATION LEAGUE,
Duke Energy Progress, LLC for	)	SOUTHERN ALLIANCE FOR CLEAN
Approval of Smart Saver Solar as	)	ENERGY, UPSTATE FOREVER,
Energy Efficiency Program	)	NORTH CAROLINA SUSTAINABLE
	)	ENERGY ASSOCIATION, AND VOTE
Application of Duke Energy	)	SOLAR'S RESPONSE IN OPPOSITION
Carolinas, LLC for Approval of	)	TO SOUTH CAROLINA OFFICE OF
Smart Saver Solar as Energy	)	REGULATORY STAFF'S MOTION TO
Efficiency Program	)	STRIKE CERTAIN TESTIMONY

Pursuant to S.C. Code Ann. Regs. 103-829 and applicable South Carolina law, the South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Upstate Forever, North Carolina Sustainable Energy Association, and Vote Solar (collectively, "Clean Energy Intervenors") hereby respond in opposition to the South Carolina Office of Regulatory Staff's ("ORS") Motion to Strike Certain Testimony (the "Motion") from Clean Energy Intervenors' Witness Eddy Moore. The South Carolina Public Service Commission ("Commission") has substantial discretion over the admissibility of evidence during a hearing. Contrary to the claims in ORS's Motion, Witness Eddy Moore's surrebuttal testimony is proper, as it responds to the rebuttal testimony of Duke Energy Witness Duff and does not contain improper legal argument. ORS's Motion relies on grounds that are not only incorrect under South Carolina law, but contrary to Commission practice and ORS's own practice in these and previous dockets. Most troubling, ORS argues that Clean Energy Intervenors should essentially have no opportunity to respond to ORS's testimony,

a position at odds with basic notions of fairness. The Commission should deny the Motion in its entirety.

RESPONSE

A. Commission Discretion Over Admissibility of Evidence

ORS'S Motion seeks to deprive the Public Service Commission of relevant and probative evidence submitted by Clean Energy Intervenors in surrebuttal testimony. The Commission has substantial discretion over the admissibility of evidence, including its review of motions to strike, and its decision will stand unless there is an abuse of discretion. *Hofer v. St. Clair*, 290 S.C. 503, 513 (1989); *Totaro v. Turner*, 273 S.C. 134, 135 (1979).

Indeed, the Commission's discretion on these matters is particularly broad because:

“Unlike a jury, the Commission is considered a panel of experts. *Hamm v. South Carolina Public Service Com'n*, 309 S.C. 282, 287, 422 S.E.2d 110, 113 (1992). . . The Commission, like a court, can hear testimony and give that testimony whatever weight it deems appropriate, as well as determine if it is reasonable and prudent to hear such testimony in deciding as to whether it may be inadmissible.”

In Re: Petition of Bridgestone Americas Tire Org., LLC for an Ord. Compelling Dominion Energy S.C., Inc. to Allow the Operation of A 1980 Kw Ac Solar Array As Authorized by State L., No. 2020-535, 2020 WL 4804794, at *7 (Aug. 14, 2020). For this reason, in order to create a complete record, motions to strike are disfavored in administrative proceedings. *See, In re ConocoPhillips Transp. Alaska, Inc., et al.*, 2011 WL 6318621 (Reg. Comm'n. of Alaska 2011) (cited in SC PSC Order No. 2014-5-H). The Commission is fully able to consider the relative weight of the disputed testimony at the hearing on the merits in this case.

Here, the surrebuttal testimony of Witness Moore is relevant to the subject of whether Duke's proposed Solar as EE Programs are in the best interest of South Carolina ratepayers. Witness Moore's testimony will be subject to cross-examination and examination by the Commissioners. At the close of that testimony, the Commission can determine for itself the weight that it gives that testimony before rendering its decision in these dockets. ORS's effort to remove Witness Moore's complete testimony from the record before the Commissioners have a chance to judge for themselves its relevance and weight should be denied.

B. Witness Moore's Testimony is Proper Surrebuttal Testimony

1. Witness Moore's testimony was in response to Duke Energy's rebuttal testimony.

ORS seeks to disallow seven portions of Witness Moore's surrebuttal testimony from being admitted into the record of this proceeding, claiming that Clean Energy Intervenors improperly used surrebuttal testimony to respond to ORS's direct testimony rather than the rebuttal testimony filed by Duke Energy Witness Duff. However, the portions of surrebuttal testimony at issue provide Witness Moore's expert opinion on Witness Duff's rebuttal testimony, including where Witness Moore's opinion deviates from that of Witness Duff.

The standard for reply testimony is broad. Under South Carolina law, even in a criminal proceeding where surrebuttal testimony is offered against a defendant, "any arguably contradictory testimony is proper on reply," and admissibility is firmly within the discretion of the trial court. *State v. South*, 285 S.C. 529, 535, 331 S.E.2d 775, 779 (1985)

(emphasis added). See also, *State v. Stewart*, 283 S.C. 104, 107, 320 S.E.2d 447, 449 (1984). Witness Moore’s testimony easily satisfies that standard.

For example, ORS seeks to strike portions of Witness Moore’s surrebuttal testimony on page 2, where he states that he believes Witness Duff’s rebuttal to ORS’s witnesses could leave the Commission with an “incomplete, and somewhat confusing picture of the current South Carolina EE/DSM framework.” Moore Surrebuttal at p. 2, ll. 6-7. In Witness Moore’s testimony regarding Witness Duff’s testimony on lost revenues, Witness Moore states that he “believe[s] Witness Duff does not go far enough,” and provides his own expert opinion on that issue. *Id.* at p. 7, l. 9 – p. 8, l. 15. In other instances, Witness Moore provides context and additional commentary that were not included in Witness Duff’s testimony. *Id.* at p. 11, l. 10 – p. 12, l. 3. ORS seemingly wishes to strike any portion of Witness Moore’s testimony that mentions ORS at all. ORS Motion, Appendix A at p. 4, ll. 14-15, p. 5, ll. 10-11, p. 15, ll. 7-8.

The primary rational for limiting reply testimony is to prevent a party from injecting new issues into a case that the party should have raised in its case in chief. Order 2020-439 (*In Re: Ann. Rev. of Base Rates for Fuel Costs of Duke Energy Progress, LLC*, No. 2020-1-E, 2020 WL 3620264, at *7 (June 30, 2020) (South Carolina law “limits reply testimony, which includes surrebuttal testimony, to that which responds to matters already raised.”) Witness Moore did not raise any new matters in surrebuttal testimony; each issue addressed in his surrebuttal was raised by Duke Witness Duff in rebuttal. Where Witness Moore discusses ORS’s direct testimony, he does so for the purpose of responding to Witness Duff. Any response to rebuttal testimony must necessarily also address the testimony being

rebutted—in this case, direct testimony. Addressing this underlying testimony does not fall outside the scope of proper surrebuttal testimony.

Significantly, as discussed further below, granting ORS’s Motion would effectively insulate ORS’s testimony from the scrutiny of intervenors. But intervenors are free to take positions that are different than ORS’s positions in Commission proceedings. Commission proceedings involve complex technical, policy, and economic issues, and each party regularly has distinct and nuanced positions. This discourse adds value to Commission proceedings, and leads to a more robust record. The criminal cases cited by ORS are easily distinguishable in this basis alone.

2. Even if Witness Moore’s testimony did respond to ORS’s direct testimony, permitting said testimony is common practice in Commission proceedings and would not unduly prejudice ORS or any other party.

Even assuming, *arguendo*, that Witness Moore’s testimony was responsive to ORS’s direct testimony, permitting said testimony would be firmly within the Commission’s discretion, consistent with past Commission practice, and would not unduly prejudice ORS or any other party.

ORS argues that due to “the element of unfair surprise,” it will suffer undue prejudice if the Commission allows Witness Moore’s surrebuttal testimony into the record. However, intervenors have commonly addressed ORS testimony in surrebuttal.¹ This

¹ See, e.g., Surrebuttal Testimony of Kenneth Sercy for CCEBA, Docket No. 2019-226-E, at p. 2, 10, <https://dms.psc.sc.gov/Attachments/Matter/6f5928de-5e89-4730-a95e-9bb60938c6e6>; Surrebuttal Testimony of Kevin Lucas for CCEBA, Docket Nos. 2019-224-E and 2019-225-E, at pp. 22-23, <https://dms.psc.sc.gov/Attachments/Matter/7b8cf492-b0cd-45af-a4b9-8f941983ffd4>; Surrebuttal Testimony of Justin Barnes for NCSEA and SEIA, Docket No. 2020-229-E, <https://dms.psc.sc.gov/Attachments/Matter/9ebff7f8-439c-46c6-a386-ffff908ca632>; Surrebuttal Testimony of Eddy Moore for CCL et al., Docket Nos. 2020-264-E and 2020-265-E, pp. 12-18, <https://dms.psc.sc.gov/Attachments/Matter/cf06e06f-0b48-4b95-a8a8-afc70b2ba797>.

appears to be the first time ORS has sought to strike surrebuttal testimony on the grounds it does here. ORS itself has filed surrebuttal testimony in which its witnesses respond to the utilities' rebuttal testimony *and* the underlying intervenor direct testimony—just as Witness Moore did here.

For example, in the recent Duke Energy Integrated Resource Plan dockets, ORS Witness Lane Kollen's surrebuttal testimony addressed Duke Energy's rebuttal to the direct testimony of intervenor Carolinas Clean Energy Business Alliance, and noted that Duke Energy supported ORS's methodology rather than intervenor CCEBA's methodology set forth in the Surrebuttal Testimony of Kevin Lucas, SC PSC Docket Nos. 2019-224-E and 2019-225-E at p. 3 ll. 7-10.² In the 2020 Dominion Energy South Carolina rate case, ORS Witness Michael Seaman-Huynh testified on surrebuttal that he agreed with DESC's rebuttal and addressed issues raised in the direct testimony of Department of Consumer Affairs Witness Dismukes—the same form of response ORS now moves to strike. *See* Revised Surrebuttal Testimony of Michael L. Seaman-Huynh, SC PSC Docket No. 2020-125-E at p. 2 ll. 7-21.³

No aspect of Witness Moore's surrebuttal testimony—either its substance or when it was filed—should have been a “surprise” to ORS. Clean Energy Intervenors submitted surrebuttal testimony at the time and manner directed by the Commission in its procedural schedule. As noted above, Witness Moore's testimony did not raise any new arguments; to the extent his testimony addressed arguments not in his direct, he did so because those issues were raised by ORS's own witnesses and to which Duke Energy responded. As such,

² Available at <https://dms.psc.sc.gov/Attachments/Matter/d024cfb9-257c-45a5-8b19-0f1fcb65c47d>.

³ Available at <https://dms.psc.sc.gov/Attachments/Matter/49e3936c-f69a-43ea-bd39-361ff9378adf>.

ORS has no valid claim of undue prejudice. Indeed, it is hard to imagine ORS filing a similar motion to strike in the event that Witness Moore had noted his agreement with positions taken by ORS witnesses in their direct testimony. The Commission should not allow the admissibility of testimony to turn on whether a witness agrees or disagrees with ORS's positions in a contested docket.

ORS further claims that allowing Witness Moore's testimony into the record would deprive ORS of the opportunity for a meaningful response. However, as noted above, Witness Moore's surrebuttal testimony did not raise any new issues, and each of the parties may address arguments raised in surrebuttal at the hearing and through cross-examination pursuant to well-established practice. ORS asserts that, if Clean Energy Intervenors wished to respond to ORS's direct testimony, even indirectly, they should have known to ask the Commission for such an opportunity, and, as noted above, ORS would have opposed allowing for that opportunity. ORS itself made no such request of the Commission in this proceeding to respond to Clean Energy Intervenors' Testimony. It is telling that ORS, after failing to meet the very standard it would apply to Clean Energy Intervenors, now claims it had no meaningful opportunity to respond.

In reality, it is the Clean Energy Intervenors who should be caught off guard by ORS's actions in this proceeding. In its Motion, ORS argues that Clean Energy Intervenors could not have responded to ORS's testimony in any way—directly or indirectly—except by asking the Commission for leave to file rebuttal testimony. But ORS does not stop there. It argues that even in that instance, such a request would be improper and should be denied

by the Commission.⁴ ORS's position would completely bar intervenors from responding to ORS's testimony.

It is important to note that the Commission recently opened a generic docket to address the proper scope of surrebuttal testimony, and a procedural schedule is pending. Despite the pendency of that proceeding, ORS is requesting that the Commission strike Witness Moore's testimony in these dockets based on a standard that substantially departs from common Commission practice, including ORS's own conduct in past proceedings, and which Clean Energy Intervenors could not have reasonably anticipated.

3. ORS's Motion proposes requirements for the timing and nature of rebuttal and surrebuttal testimony that would substantially increase the burden on parties and the Commission; these issues are most appropriately addressed in the generic docket expressly open for that purpose.

Finally, the standard laid out in ORS's Motion would result in substantial procedural unfairness and unnecessarily waste Commission and parties' already-scarce time and resources. ORS's Motion argues that Clean Energy Intervenors could *only* have responded to ORS's direct testimony by filing a motion requesting that the Commission establish an additional rebuttal testimony deadline. Illogically, ORS states that allowing intervenors to respond to ORS testimony at the same time as surrebuttal would deprive "the Commission, customers, and other interested persons from being made fully aware of each of the parties' positions in advance of a hearing on the merits" and would "not support administrative economy or fairness." ORS Motion at 4.

⁴ ORS's Motion indicated ORS's position that ORS/intervenors' testimony should only be focused on the Application. Motion at p. 4, fn. 5.

As noted previously, it is common for Intervenors and ORS to take positions different than—and sometimes contrary to—each other and the utility in question, and it is in the interest of the Commission for witnesses to provide their expert opinion on other parties’ testimony and positions. Yet the standard ORS proposes would substantially increase the number of filings required for non-utility parties to provide these expert opinions to the Commission, and would unnecessarily increase the burden of intervenors to participate in Commission proceedings.⁵ ORS’s proposed standard would be contrary to judicial economy and common sense. It is far more reasonable for intervenors and ORS to submit reply testimony that responds to utility rebuttal testimony and other parties’ direct testimony at the same time.

Regardless, the Commission has substantial discretion over the admissibility and procedure applicable to all reply testimony, and it need not address these issues today. It would not be an abuse of discretion for the Commission to deny ORS’s Motion to strike Witness Moore’s testimony and doing so would not result in prejudice to ORS. The Commission can resolve issues related to surrebuttal testimony in the generic docket established for that purpose, after hearing from all interested parties.

C. Witness Moore’s Testimony is Not Impermissible Legal Opinion

⁵ According to ORS, for Intervenors to respond to any arguments raised by ORS, they would have to prepare, at minimum, four separate filings, versus two under the current standard procedural schedule: (1) **direct testimony** in response to the utility; (2) a **motion** requesting that the Commission establish another rebuttal testimony deadline, to which ORS or other parties would have 10 days to respond; if that request was granted, Intervenors would, at minimum, then have two additional filings, (3) **rebuttal** to ORS’s testimony and (4) surrebuttal in response to ORS. This onerous process is entirely unnecessary, and would be entirely untenable under Commission procedural schedules.

Contrary to ORS's Motion, Witness Moore's testimony does not include inadmissible legal testimony and the Commission should also deny the Motion on these grounds.

First, expert testimony on legal issues is *not* inadmissible under the South Carolina Rules of Evidence. Rule 702 specifically allows testimony in the form of an expert opinion if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 704 further provides that expert testimony is not inadmissible simply because it embraces an ultimate issue. *Vortex Sports & Entertainment, Inc. v. Ware*, 378 S.C. 197, 207-208 (2008) (finding that a law professor's testimony on specific acts by defendant and how those acts constituted a breach of his fiduciary duty to plaintiff were admissible).

ORS cites *Dawkins v. Fields* in support of its proposition that legal opinion testimony is never admissible, but in fact that case offers a more nuanced standard. 354 S.C. 58 (2003). After noting that, "Rule 702, SCRE, provides that '[i]f ... *specialized knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise," the *Dawkins* court rejected the expert's affidavit on the basis that it "attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment" and "read[] as if it could have been respondents' oral argument." 354 S.C. 58, 65-66 (2003) (emphasis added). In fact, the challenged testimony in that case was offered in response to a motion for summary judgment, the basis for which is that there *are* no issues of material fact, and that judgment is warranted as a matter of law. *Id.* at 65. Thus, it is clear under this case that

expert witnesses cannot act like lawyers, but can present testimony that is “designed to assist the [] court to understand certain facts,” *id.*, which in many circumstances will require presenting those facts within the relevant legal framework. In another case cited by ORS, Green v. State, the Court specifically noted that the expert testimony should be excluded because it “offered no factual evidence,” and that the expert had “proffered his opinion, *assuming certain facts*, [that] trial counsel’s actions fell below acceptable legal standards of competence.” 351 S.C. 184, 198 (2002). That is simply not the case here.

More recent South Carolina Supreme Court cases have removed any doubt on the question and have allowed trial courts to admit testimony regarding legal issues when it will assist the trier of fact in making its determinations and where issues are complex. *State v. Morris*, 376 S.C. 189, 205 (2008); *see also Vortex*, 378 S.C. at 207-208. And, many courts have made clear that the limits on expert legal testimony that are necessary in jury trials, where a jury may be improperly influenced by witness testimony on legal issues, are not where a judge determines both the facts and law. *See, e.g., U.S. v. Brown*, 415 F.3d 1257, 1269 (11thCir. 2005) (“In a bench trial, “[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for h[er]self”); *Martin v. Ind. Mich. Power Co.*, 292 F. Supp. 2d 947, 959 (W.D. Mich. 2002); *Apple Glen Inv’rs, L.P. v. Express Scripts, Inc.*, 2015 WL 3721100, at *4 (M.D. Fla. June 15, 2015).

The Commission itself has recognized this distinction. SC PSC Order No. 1999-665, Docket No. 1999-033-C (denying a motion to strike expert testimony because, though the witness discussed some matters of law, he also discussed the ultimate factual questions in issue). But ORS’s Motion effectively seeks to treat the Commission like a jury in a criminal proceeding, to be protected from the influence of evidence submitted by Clean

Energy Intervenors. The Commission is perfectly capable of determining for itself the weight that it gives that testimony in rendering its decisions in these dockets. Id.

Witness Moore's surrebuttal testimony provides the Commission with the necessary statutory background and context to assess the factual issues relevant to his testimony and is not impermissible legal briefing in the guise of testimony. Citing legal standards is not legal pleading or opinion. Indeed, identifying relevant legal standards and frameworks, and establishing how the facts do or do not fit into those standards, is central to expert testimony in Commission proceedings. Arguably, providing such legal context is *necessary* for expert testimony to be useful to the Commission. For example, in one portion of testimony that ORS seeks to strike, Witness Moore testifies about the factual distinctions between lost revenues recovered under Act 236 relating to customer-generators, and net-lost revenues collected under the EE/DSM framework. Moore Surrebuttal at p. 6 l. 19 – p. 7 l. 2 and p. 9 ll. 8-13. Witness Moore necessarily had to testify to this legal framework to address these factual distinctions in his testimony.

Not surprisingly, ORS's own testimony makes no effort to avoid discussion of legal frameworks that they think are relevant to this docket. Arguably, ORS's witnesses provide substantially more "legal opinions" than Witness Moore did in his testimony. For example, on page 7 of ORS Witness Horii's direct testimony, he testifies as to whether solar can be classified as EE/DSM under the terms of S.C. Code § 58-37-20. His conclusion that rooftop solar does not satisfy this statutory definition forms a significant part of the basis for his opposition to the program and is the very kind of "legal opinion" that ORS now objects to in Witness Moore's testimony. On page 9 of ORS Witness O'Neal Morgan's testimony, he

provides his opinion on whether the collection of net lost revenues through the proposed program would conflict with Act 62's prohibition on lost revenues.

It would be absurd and unworkable in Commission proceedings to bar expert witnesses from commenting on whether utility proposals comply with the statutory framework under which they operate. Witness Moore has personal knowledge and experience regarding the relevant South Carolina statutory framework applicable to these proceedings, and as such, his testimony is relevant and admissible, and ORS's Motion should be denied.

For the foregoing reasons, we ask that the Commission deny the Motion in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the parties listed below have been served via first class U.S. Mail or electronic mail with a copy of the *Response to Office of Regulatory Staff's Motion to Strike Certain Testimony* on behalf of South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, North Carolina Sustainable Energy Association, and Upstate Forever.

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This 27th day of October, 2021.

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